88-1475

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

PAUL A. JOHNSON,	§
Petitioner,	§
vs.	§
STATE OF ALABAMA,	§
Respondent.	§

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

ROBERT F. PRINCE
PRINCE, McGUIRE & COOGLER, P.C.
2501 Sixth Street
Tuscaloosa, Alabama 35401
(205) 345-1105

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, REQUIRE A STATE APPELLATE COURT TO EXAMINE THE SUFFICIENCY OF THE EVIDENCE ISSUE, EVEN THOUGH OTHER GROUNDS FOR REVERSAL AND REMAND FOR NEW TRIAL EXISTS, WHEN RAISED BY A DEFENDANT ON ORIGINAL APPEAL?

2. MAY A STATE PROCEED TO TRIAL, AFTER A REVERSAL AND REMAND ON TRIAL ERROR, WHILE A SUFFICIENCY OF THE EVIDENCE ISSUE IS PENDING DIRECT APPEAL?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS BELOW	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
1. The State of Alabama, by refusing to acknowledge and address Petitioner's insufficiency of the evidence issue, is in direct conflict with the decisions of Federal Circuit Courts	9
2. Petitioner's Fifth and Fourteenth Amendment rights were violated by State of Alabama's failure to address the sufficiency of the evidence issue on original appeal	14

3. Petitioner's case presents an important question concerning the application of the direct appeal process 17

CONCLUSION 19

CERTIFICATE OF SERVICE 20

APPENDIX

Appendix A:

Opinion of Alabama Court of Criminal Appeals of September 20, 1988 . . . . A

Appendix B:

Denial of Application for rehearing by Alabama Court of Criminal Appeals on October 28, 1988 . . . . . B

Appendix C:

Denial of Petition for Writ of Certiorari by Alabama Supreme Court dated December 12, 1988 . . C

Appendix D:

Remand by Alabama Court of Criminal Appeals to Pickens County Circuit Court for re-trial dated December 23, 1988 . . . . . D

Appendix E:

Petitioner's Brief in support of Petition for Writ of Certiorari to Alabama Supreme Court . . . E

TABLE OF AUTHORITIES

CASES — PAGE

Batson v. Kentucky,
476 U.S. 79, 106 S.Ct. 1712,
90 L.Ed. 69 (1986) 18

Burks v. United States,
437 U.S. 1, 98 S.Ct. 2141,
57 L.Ed. 1 (1978) 8,13,16

Griffith v. Kentucky,
479 U.S. 928, 107 S.Ct. 708,
93 L.Ed.2d 649 (1987) 18

Lowery v. City of Boaz,
393 So.2d 534 (Ala.Crim.App.
1981) 15,16

United States v. Bizzard,
679 F.2d 1382 (11th Cir. 1982),
cert. denied, 103 S.Ct. 305 . . 13

United States v. Gonzales-Sanchez,
825 F.2d 572 (1st Cir. 1987) . . 12

United States v. Hodges,
770 F.2d 1475, 1477
(9th Cir. 1985) 11

United States v. Sneed,
705 F.2d 745 (5th Cir. 1983) . 11,12

CONSTITUTION OF THE UNITED STATES

Fifth Amendment 3,6,9,14,15

Fourteenth Amendment . . 3,6,9,14,15

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

PAUL A. JOHNSON,	§
Petitioner,	§
vs.	§
STATE OF ALABAMA,	§
Respondent.	§

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

Petitioner, Paul Anthony Johnson, prays that a Writ of Certiorari issue to review the judgment of the Alabama Court of Criminal Appeals in this case.

OPINION BELOW

Petitioner was convicted of Murder by a Pickens County, Alabama, Jury on July 25, 1985. Petitioner timely filed written Notice of Appeal to the Alabama Court of Criminal Appeals on October 22, 1985. The opinion of the Alabama Court of Criminal Appeals was rendered on September 20, 1988, and is attached as Appendix "A" hereto. The Alabama Court of Criminal Appeals denied applications for rehearing on October 28, 1988, and is attached as Appendix "B" hereto. The Alabama Supreme Court denied without opinion petitions for certiorari on December 23, 1988, and is attached as Appendix "C" hereto.

JURISDICTION

The jurisdiction of the Supreme

Court of the United States is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Fourteenth Amendment provides:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor shall any state deprive any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment provides:

> "[N]or shall any person be

subject for the same offense to be twice put in jeopardy of life or limb . . ."

STATEMENT OF THE CASE

Petitioner was indicted and convicted of the offense of Murder. The Petitioner was sentenced to life imprisonment in the penitentiary. The Petitioner's conviction was appealed to the Alabama Court of Criminal Appeals and on September 23, 1988, the Alabama Court of Criminal Appeals reversed the case and remanded the case to the trial court. ___ So.2d ____ (Ala.Crim.App. 1988). The Alabama Court of Criminal Appeals' reversal was based on the fact that the Petitioner might have been prejudiced due to the failure of a juror to properly answer to a question during the voir dire

examination. (See Appendix "A.") Application for rehearing on the part of the Petitioner was denied on October 28, 1988.

On original appeal, the Petitioner challenged the sufficiency of the evidence. The sufficiency issue was not addressed by the Alabama Court of Criminal Appeals. Therefore, Petitioner petitioned the Alabama Supreme Court for a Writ of Certiorari. (See Appendix "E.") The Alabama Supreme Court denied Petitioner's Writ for Certiorari on December 23, 1988, without an opinion. (See Appendix "C.") Petitioner is currently pending trial in Pickens County, Alabama. (See Appendix "D.")

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

On original appeal, the Petitioner

challenged the sufficiency of the evidence. However, the Alabama Court of Criminal Appeals' reversal and remand for a new trial was based on the failure of a juror to adequately respond to a question posed by defense counsel during voir dire examination. (See Appendix "A.") Petitioner's Brief in Support of Petition for Writ of Certiorari to the Alabama Supreme Court raised only one issue, "Whether the Court of Criminal Appeals erred by reversing and remanding for a new trial the Petitioner's conviction without addressing the issue of sufficiency of the evidence as raised by the Petitioner in his original appeal?", and is attached as Appendix "E." Petitioner raised both Fifth and Fourteenth Amendment violations caused by the Alabama Court of Criminal Appeals'

failure to address the sufficiency of the evidence issue. (See Petitioner's Brief in Support of Petition for Writ of Certiorari, Appendix "E.") The Alabama Supreme Court without opinion, denied Petitioners' Petition for Writ of Certiorari on December 23, 1988. (See Appendix "C.")

REASONS FOR GRANTING THE WRIT

The State of Alabama's failure to acknowledge Petitioner's sufficiency issue raised on original appeal, does not conform to the decisions rendered by several Federal Circuit Courts. The First, Third, Fifth, Ninth and Tenth Federal Circuit Courts have held that the double jeopardy clause requires an appellate court to examine the sufficiency of the prosecution's evidence to determine whether the case should have been submitted to a jury in the first place. Also, this Court has held that, "The double jeopardy clause precludes a second trial once the reviewing Court has found the evidence legally insufficient, the only just remedy available for that Court is the direction of a judgment of acquittal." Burks v. U. S., 98 S.Ct.

2141 (1978).

The State of Alabama's refusal to acknowledge Petitioner's sufficiency issue is an abandonment of its duty to enforce the double jeopardy provision found in the Fifth Amendment and futhermore, denies Petitioner his right to due process of the law under the Fourteenth Amendment. The Alabama Supreme Court's disregard for Petitioner's constitutional rights under the Fifth and Fourteenth Amendments will result in subjecting the Petitioner to the additional expense, ordeal of trial and will subject the Petitioner to the possibility that even though he is innocent he again might be convicted.

1. The State of Alabama, by refusing to acknowledge and

address Petitioner's sufficiency of the evidence issue, is in direct conflict with the decisions of the First, Third, Fifth, Ninth and Tenth Federal Circuit Courts.

The Alabama Supreme Court without opinion denied Petitioner's Petition for Writ of Certiorari which requested appellate review of the sufficiency of the evidence. Petitioner challenged the sufficiency of the evidence at trial and devoted the majority of his brief and oral argument before the Alabama Court of Criminal Appeals to a lengthy recitation of the facts and the application of those facts to the existing standard of law with regard to sufficiency. In his Brief in Support of Petition for Certiorari to the Alabama Supreme Court, Petitioner

addressed only the sufficiency issue.

"[T]he existence of other grounds for reversal does not relieve an appellate court of the need to first review the sufficiency of the evidence." United States v. Hodges, 770 F.2d 1475, 1477 (9th Circuit, 1985). Petitioner's case was reversed and remanded for a new trial because reversible error resulted from the failure of a Juror to respond to Petitioner's attorney's voir dire question. Notwithstanding the prejudice resulting from that failure, the Petitioner contends that the evidence presented was nonetheless insufficient as a matter of law.

Petitioner adopts the rational and reasoning of the Fifth Circuit by Judge Rubin in United States v. Sneed, 705 F.2d 745 (1983), which adopted the position of

the Third, Ninth, and Tenth Circuits, when confronted with Appellate review of the sufficiency of the evidence. In Sneed, the Court held that it would be incorrect to presume that because the sufficiency issue was raised on appeal but not addressed, that the sufficiency of evidence issue had been considered and rejected. Sneed, at 749. The Ninth Circuit's holding was adopted by the First Circuit in United States v. Gonzales-Sanchez, 825 F.2d 572 (1987). Although other grounds exist to reverse a conviction, the challenge to sufficiency of the evidence must be reviewed in order to ensure there is no violation of the double jeopardy clause. Gonzales-Sanchez

at 588[1]. If the evidence presented against Petitioner was insufficient to sustain his conviction, then a re-trial of the Petitioner would be barred by the double jeopardy clause. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57

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[1]There is dicta citing the proposition that when a sufficiency issue is argued on original appeal, and there was no ruling or acknowledgment of the issue, then there must have been a determination that there was sufficient evidence to support the verdict. U.S. v. Bizzard, 674 F.2d 1382 (11th Cir., 1982), cert. denied, 103 S.Ct. 305. Petitioner is aware of said dicta, but notes that the Court's statement was unsupported by any citation of precedence, and would state that he has found none.

L.Ed 1 (1978).

The holdings of the First, Third, Fifth, Ninth and Tenth Federal Circuits reflect sound judgment and judicial policy with respect to the double jeopardy clause. The State of Alabama's refusal to acknowledge or address Petitioner's sufficiency of the evidence issue, directly conflicts with the above-mentioned Federal Circuit Courts. This Court should therefore grant certiorari and resolve the conflict that exists on the question of Appellate Court review on sufficiency of the evidence issues.

2. Petitioner's Fifth and Fourteenth Amendment rights were violated by the State of Alabama's failure to address the sufficiency of the evidence issue on original appeal.

Petitioner was tried and convicted of Murder. The trial judge sentenced the Petitioner to life imprisonment in the penitentiary. The Petitioner challenged the sufficiency of the evidence against him at trial and on original appeal. The State of Alabama has refused to acknowledge or address Petitioner's sufficiency issue.

The Fifth Amendment guarantee against double jeopardy and the Fourteenth Amendment's guarantee of due process of law have been circumvented by the State of Alabama's abandonment of its duty to review Petitioner's sufficiency of the evidence issue.

The concept of appellate review of the sufficiency of evidence is not unknown to the State of Alabama. In Lowery v. City of Boaz, 393 So.2d 534

(Ala.Crim.App. 1981), the Alabama Court of Criminal Appeals reversed a municipal violation conviction due to the insufficiency of the evidence at trial. Lowery at 538. The Defendant in Lowery was convicted at trial of issuing a worthless check in violation of an ordinance of the City of Boaz. Lowery at 535. The Alabama Court of Criminal Appeals, after a thorough review of the law and the evidence cited Burks and held that, "because the double jeopardy clause bars a second trial after a reversal of a conviction because of the insufficiency of the evidence to convict, the defendant's conviction must be reversed and rendered." Lowery at 538. This refusal to acknowledge Petitioner's due process rights and his right not to be twice placed in jeopardy by the State of

Alabama, is a manifestly unjust decision. This Court should therefore grant certiorari and address this unjust result.

3. Petitioner's case presents an important question concerning the direct appeal process.

Due to the reversal and remand by the Alabama Court of Criminal Appeals and the denial of certiorari by the Alabama Supreme Court, the Petitioner is currently pending re-trial in Pickens County, Alabama. Therefore, Petitioner while on appeal to this court seeking a Writ of Certiorari to the Alabama Supreme Court to acknowledge and address the sufficiency issue could be re-tried in Pickens County, Alabama. This Court has jurisdiction of Petitioner's petition under 28 U.S.C. §1257(3), while the

Pickens County Circuit Court has jurisdiction pursuant to the reversal and remand from the Alabama Court of Criminal Appeals. (See Appendix "D.")

Petitioner would argue that the principals of direct review and finality, stated by this Court in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), and Griffith v. Kentucky, 479 U.S. 928, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), should apply and that re-trial before a determination by this Court on Petitioner's Petition for Writ of Certiorari would constitute a denial on Petitioner's statutory right to review by this Court. Therefore, Petitioner would argue that Batson and Griffith mandate a review by this Court before further State Court proceedings occur. This Court should therefore, grant

certiorari and issue a stay to the State of Alabama pending the determination by this Court on Petitioner's direct appellate review.

CONCLUSION

For the reasons stated herein this Court should grant this petition for Writ of Certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,
PRINCE, McGUIRE & COOGLER, P.C.
2501 Sixth Street
Tuscaloosa, Alabama 35401
(205) 345-1105

Robert F. Prince
Counsel for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Alabama Attorney General with three (3) corrected copies of this Petition by depositing the same in the United States Mail with adequate postage prepaid thereon and properly addressed to him.

This the 21st day of March, 1989.

Robert F. Prince
PRINCE, McGUIRE & COOGLER, P.C.
2501 Sixth Street
Tuscaloosa, Alabama 35401
(205) 345-1105

COUNSEL FOR PETITIONER

APPENDIX "A"

FILED
SEP 20 1988
ALA COURT CRIMINAL APPEALS
MOLLIE JORDAN, CLERK

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1987 - 88

2 Div. 511

Paul Anthony Johnson

v.

State

Appeal from Pickens Circuit Court

On Return to Remand

TYSON, JUDGE

Paul Anthony Johnson was indicted for murder in violation of § 13A-6-2, Code of Alabama 1975. The jury found the appellant guilty as charged in the indictment. The appellant was sentenced to life imprisonment in the state penitentiary.

On July 26, 1984, Francis Johnson, the victim, was found dead in the bedroom of her home by this appellant. The appellant was the victim's husband. The cause of death was strangulation and stab wounds in the chest.

The house where the murder occurred is located in Pickens County, Alabama.

I

The appellant asserts that the trial judge erred by denying his motion for a new trial based on a juror's failure to respond to a question during voir dire.

Defense counsel, Robert Prince, explained at the beginning of his questioning during voir dire that his questions applied to family members. Prince asked the jury venire the following: "Is there any member of the panel who is a police officer or a former

police officer? That question would apply to your wife or husband. Any kind of law enforcement; highway patrol, deputy sheriff, city police?" (R. 30). The following responses were given by members of the jury venire:

> "PJ HESTER: Debra Hester. My husband is kinned to Dexter Hester.
>
> "MR. PRINCE: All right. Your husband is related to Dexter Hester?
>
> "PJ HESTER: Yes, sir.
>
> "MR. PRINCE: Does Mr. Hester work in Pickens County?
>
> "PJ HESTER: Huh-uh.
>
> "MR. PRINCE: Okay. Any other member of the panel that--yes, ma'am?
>
> "PJ Junkin: My grandfather used to be in Northport.
>
> "MR. PRINCE: In Northport, Alabama? What was your name?
>
> "PJ Junkin: Wendy Junkin.

"MR. PRINCE: How long ago was that?

"PJ JUNKIN: Boyd was his name, and it was four or five years ago." (R. 30).

At the hearing on the motion for a new trial, Jeffrey Edgeworth, who sat on the appellant's jury, testified that his sister-in-law is a Pickens County Deputy Sheriff and was so employed when the appellant's trial took place. Edgeworth observed that his sister-in-law sat in the courtroom during the entire trial. Edgeworth further testified that he raised his hand to inform Prince about his relationship to a deputy sheriff. However, Prince did not see him when he raised his hand. Edgeworth stated that his being related to a deputy sheriff would not affect his ability to judge this appellant fairly from the facts.

An affidavit by the court reporter

for the appellant's trial, Elise Smith, stated that she sat facing prospective jurors during the voir dire. Smith made a point to watch for people on the jury venire who went unnoticed when they raised their hands and notified the trial judge. Smith did not see anyone on the jury venire who raised their hand go unnoticed by the defense counsel.

Obviously, the trial judge and defense counsel also did not see Edgeworth raise his hand if, in fact, he did so. The trial judge, unfortunately, did not state his reasons for denying a new trial.

never investigated any other suspects.

> "[I]n this State the rule is well settled that 'the failure of a juror to make a proper response to a question regarding his qualifications to serve as a juror, regardless of the situation or circumstances, does not automatically entitle

one to a new trial. The proper inquiry in such cases is whether the defendant's rights were prejudiced by such failure to respond properly.' The test is not whether the defendant was prejudiced but whether he might have been."

Beauregard v. State, 372 So.2d 37, 41 (Ala.Crim.App.) writ denied, 372 So.2d 44 (Ala. 1979) (citations omitted).

"Although the factors upon which the trial court's determination of prejudice is made must necessarily vary from case to case, some of the factors which other courts have considered pertinent are: temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about.

"We are mindful of the heavy responsibility placed on the trial court to maintain the statutory right which parties have to a full and truthful disclosure by jurors on voir dire. However, we must also be

> aware of inadvertent concealment and failure to recollect on the part of prospective jurors."

Smithson v. State, 50 Ala.App. 318, 320-321, 278 So.2d 766 (Ala.Crim.App. 1973), quoting Sanders v. Scarvey, 284 Ala. 215, 224 So.2d 247 (1969). However, see Trahan v. State, 450 So.2d 1102 (Ala.Crim.App. 1984).

We are aware that not every failure of a venireman to respond correctly to a voir dire question will entitle the losing party to a new trial. Freeman v. Hall, 286 Ala. 161, 238 So.2d 330 (1970).

In Wallace v. Inman v. Campbell, 475 So.2d 521 (Ala. 1985), the plaintiff sued a police officer and the City of Andalusia, which is located in Covington County, for injuries sustained during a high speed chase with the police officer. One juror, Mrs. Richburg, failed to

respond that she was a third cousin of the Covington County Sheriff. At the hearing on the motion for a new trial, Richburg testified that the fact she was related to the sheriff did not influence her deliberation in the case or its outcome. The Alabama Supreme Court in reversing this case and requiring a new trial pointed out:

> "[N]ot knowing that a potential juror is a relative of the county sheriff would probably result in prejudice to the plaintiff in an action against a local policeman when the sole issue litigated was the propriety of a high-speed automobile chase by a police officer seeking to make an arrest. It is highly unlikely that the plaintiff's lawyer would have chosen not to strike Mrs. Richburg had he known of her kinship to Sheriff Harrell. We are aware that not every failure of a venireman to respond correctly to a voir dire question will entitle the losing party to a new trial. See, e.g. Martin v. Mansell, 357 So.2d 964 (Ala. 1978);

> Freeman v. Hall, 286 Ala. 161, 238 So.2d 330 (1970). However, when the prejudice to the movant is probable, we must in fairness reverse the case and remand it for a new trial. Cavalier Insurance Corp."

Id at 522. See Ex Parte Ledbetter, 404 So.2d 73 (Ala. 1981).

In the instant case, the juror was the brother-in-law of a deputy sheriff of Pickens County. The juror's failure to disclose this relationship was highly material in light of this appellant's defense that the Pickens County Sheriff's Department, from the beginning, centered its entire investigation on the appellant and did not investigate any other suspects.

Under the circumstances, we will assume that the prejudice to this appellant was very likely and probable.

The fact that the juror testified at

the hearing on the motion for a new trial that his relationship to the deputy sheriff did not affect his ability to judge the appellant fairly would not overcome the prejudice to the appellant. Wallace By Inman v. Campbell, supra.

Although the voir dire question of defense counsel was not "overly specific" it was "specific enough" and should have elicited a response. Ex Parte Poole, 497 So.2d 537, 542 (Ala. 1986).

Defense counsel had a right to know that this juror was related to a deputy sheriff so that he could knowingly exercise his peremptory strikes. Morris v. Zac Smith Stationery, 274 Ala. 467, 149 So.2d 810 (1963). It is doubtful that, if defense counsel had known that a juror was related to the deputy sheriff, he would have let him serve on the

appellant's jury.

It should be noted that defense counsel could have made his question clearer regarding persons being related to law enforcement officials. However, from the testimony given by juror Edgeworth at the hearing on the motion for a new trial, in our opinion it is clear that Edgeworth understood that the question as asked by defense counsel applied to his sister-in-law who, in fact, was a Pickens County Deputy Sheriff. Ex Parte Poole, 497 So.2d 537, 542 (Ala. 1986).

Thus, in fairness to the appellant, this case must be reversed and remanded for a new trial.

REVERSED AND REMANDED.

All the Judges concur.

APPENDIX "B"

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

2 Div. 511

Paul Anthony Johnson

v.

State

Appeal from Pickens Circuit Court
No. CC 85-001

IT IS ORDERED that the application for rehearing filed by appellant in the above cause be and the same is hereby overruled.

IT IS FURTHER ORDERED that the Rule 39(k) motion and application for rehearing filed by the State in the above cause be and the same are hereby denied and overruled.

WITNESS, Mollie Jordan, Clerk of the

Court of Criminal Appeals, this 28th day of October, 1988.

s/Mollie Jordan
CLERK, COURT OF CRIMINAL
APPEALS OF ALABAMA

APPENDIX "C"

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 23, 1988

88-199

EX PARTE: State of Alabama

PETITION FOR WRIT OF CERTIORARI

(Re: Paul Anthony Johnson v. State)

CCA 2/511

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Jones, J. - Torbert, CJ, Shores, Adams & Steagall, JJ.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a true and correct copy of the instrument(s) herewith set out as same appear(s) of

record in same Court.

Witness my hand this 23rd day of December, 1988.

s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX "D"

2 Div. 511
Pickens Circuit Court #CC 85-001

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE COURT OF CRIMINAL APPEALS OF ALABAMA

October Term, 1987-88

To the Clerk of the Circuit Court of Pickens County, Greeting:

Whereas, the Record and Proceedings of the Circuit Court of said County, in a certain cause lately pending in said Court between PAUL ANTHONY JOHNSON, Appellant, and THE STATE, Appellee, wherein by said Court, it was considered adversely to said appellant, were brought before our Court of Criminal Appeals, by appeal taken, pursuant to law, on behalf of said appellant.

Now, it is hereby certified, That it was thereupon considered by our Court of

Criminal Appeals on the 20th day of September, 1988, that said judgment of said Circuit Court be reversed and annulled, and the cause remanded to said Court for further proceedings therein.

Oct. 28, 1988. Rule 39(k) motion denied, APPLICATIONS FOR REHEARING OVERRULED.

Dec. 23, 1988. PETITIONS FOR CERTIORARI DENIED BY THE SUPREME COURT OF ALABAMA.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, at the Capitol, this the 23rd day of December, 1988.

s/Mollie Jordan
Clerk of the Court of Criminal Appeals of Alabama.

APPENDIX "E"

IN THE SUPREME COURT
OF ALABAMA

CASE NO.

PAUL ANTHONY JOHNSON

APPELLANT

V.

STATE OF ALABAMA

APPELLEE

APPEAL FROM THE CIRCUIT COURT

OF PICKENS COUNTY, ALABAMA

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

COUNSEL FOR APPELLANT

ROBERT F. PRINCE
PRINCE, McGUIRE & COOGLER, P.C.
2501 SIXTH STREET
TUSCALOOSA, ALABAMA 35401
(205) 345-1105

QUESTION PRESENTED

I. WHETHER THE COURT OF CRIMINAL APPEALS ERRED BY REVERSING AND REMANDING FOR A NEW TRIAL THE PETITIONER'S CONVICTION WITHOUT ADDRESSING THE ISSUE OF SUFFICIENCY OF THE EVIDENCE AS RAISED BY THE PETITIONER IN HIS ORIGINAL APPEAL?

Burks v. United States,
437 U.S. 1, 98 S.Ct. 2141,
57 L.Ed.2d 1 (1978);

United States v. McKoy,
771 F.2d 1207 (9th Cir. 1985);

United States v. Sneed,
705 F.2d 745 (5th Cir. 1983);

Nicholson v. State,
369 So.2d 304 (Ala.Crim.App.
1979);

United States v. Hodges,
770 F.2d 1475, 1477
(9th Cir. 1985);

Livingston v. State,
217 So.2d 90, 44 Ala.App. 579
(1968);

Lowery v. City of Boaz,
393 So.2d 534 (Ala.Crim.App.
1981).

TABLE OF CONTENTS

		Page
I.	QUESTION PRESENTED	i
II.	TABLE OF CONTENTS	ii
III.	TABLE OF CASES AND AUTHORITIES.	iii
IV.	STATEMENT OF THE CASE	1
V.	ARGUMENT	3
VI.	CONCLUSION	9
VII.	CERTIFICATE OF SERVICE	10

TABLE OF CASES AND AUTHORITIES

	Page
Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)	5
Livingston v. State, 217 So.2d 90, 44 Ala.App. 579 (1968)	6
Lowery v. City of Boaz, 393 So.2d 534 (Ala.Crim.App. 1981)	8
Nicholson v. State, 369 So.2d 304 (Ala.Crim.App. 1979)	6
United States v. Hodges, 770 F.2d 1475, 1477 (9th Cir. 1985)	6
United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985) .	5
United States v. Sneed, 705 F.2d 745 (5th Cir. 1983) . .	5

STATEMENT OF THE CASE

The Petitioner, Paul Anthony Johnson, was indicted and convicted of the offense of murder. The trial judge sentenced the Petitioner to life imprisonment in the penitentiary. The Petitioner's conviction was appealed to the Court of Criminal Appeals, and on September 23, 1988, the Court of Criminal Appeals reversed this case and remanded the case to the trial court for a new trial. See Johnson v. State, [Ms. 2 Div. 511, Sept. 23, 1988] _____ So.2d _____ (Ala.Crim.App. 1988). The Court of Criminal Appeals' reversal was based on the fact that the Petitioner might have been prejudiced due to the failure of a juror to properly answer to a question during the voir dire examination. The Petitioner applied for rehearing on the

4th day of October, 1988. The Application for Rehearing on the part of the Petitioner was denied on the 28th day of October, 1988.

On original appeal, the Petitioner challenged the sufficiency of the evidence. This issue was not addressed by the Court of Criminal Appeals in Its original Opinion. Therefore, the Petitioner petitions this Court for a Writ of Certiorari.

ARGUMENT

I. WHETHER THE COURT OF CRIMINAL APPEALS ERRED BY REVERSING AND REMANDING FOR A NEW TRIAL THE PETITIONER'S CONVICTION WITHOUT ADDRESSING THE ISSUE OF SUFFICIENCY OF THE EVIDENCE AS RAISED BY THE PETITIONER IN HIS ORIGINAL APPEAL?

On original appeal, the Honorable Court of Criminal Appeals reversed the Petitioner's conviction and remanded his case to the trial court for a new trial. The Court's reversal was based on the failure of a juror to adequately respond to a question posed by defense counsel during voir dire examination. The Court held that, due to the unique circumstances involving the juror's failure to respond, the Petitioner may have been prejudiced to the extent that

he did not receive a fair trial.

However, in his original appeal, the Petitioner also challenged the sufficiency of the evidence. In the case before the Honorable Appellate Court, the evidence presented at trial was voluminous, contradictory, and ambiguous. Much of the Petitioner's Brief and Argument in his original appeal involved a lengthy recitation of the facts and the application of those facts to the existing standard of law with regard to sufficiency.

The Court of Criminal Appeals granted the Petitioner's request for oral arguments in his case. During those oral arguments, both the attorney for the Petitioner and the attorney for the State addressed only the question of the

sufficiency of the evidence. Yet, despite the great attention raised to the question of sufficiency, the Court of Criminal Appeals did not address the sufficiency of the evidence in Its Opinion. Whereas the Petitioner gratefully acknowledged the Court's reversal and concurred with Its reasoning, the Petitioner herein contends that, by not addressing sufficiency, he may have been denied the full protection of the law afforded him by the appellate process.

If the evidence presented at trial in this case was insufficient to sustain the Petitioner's conviction, then a re-trial of the Petitioner would be barred by the Double Jeopardy Clause. See Burks v. United States, 437 U.S. 1, 98 S.Ct.

2141, 57 L.Ed.2d 1 (1978); United States v. McKoy, 771 F.2d 1207 (9th Cir. 1985); United States v. Sneed, 705 F.2d 745 (5th Cir. 1983); Nicholson v. State, 369 So.2d 304 (Ala.Crim.App. 1979).

"[T]he existence of other grounds for reversal does not relieve an appellate court of the need to first review the sufficiency of the evidence." United States v. Hodges, 770 F.2d 1475, 1477 (9th Cir. 1985).[1]

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[1]There is dicta citing the proposition that the Appellate Court will not comment on the sufficiency of the evidence where a case is remanded for a new trial. Livingston v. State, 217 So.2d 90, 44 Ala.App. 579 (1968). In that case, the appellant won a reversal when the trial court denied a defense motion for voir dire of the witness. The Court's statement regarding Its resistance to commenting on the sufficiency of the evidence was unsupported by any citation of precedence, and the Petitioner herein has

In its present posture, the Petitioner shall be required to undergo a new trial because reversible error resulted from the failure of a juror to respond to the Petitioner's attorney's voir dire question. Notwithstanding the prejudice resulting from that failure, the Petitioner contends that the evidence presented was nonetheless insufficient as a matter of law. If such were the finding, the Petitioner would not have to endure another trial. Lowery v. City of Boaz, 393 So.2d 534 (Ala.Crim.App. 1981).

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been unable to find any further authority on this question. The Livingston opinion states that this choice was a mere policy of the Court. Livingston, supra at 585. Moreover, Livingston differs from the present case in that the Petitioner is specifically requesting a review of his sufficiency issue. The Court in the present case has not even acknowledged the existence of the issue of sufficiency in Its Opinion.

For these reasons, the Petitioner respectfully requests this Court to examine the issue raised herein, and to remand this case back to the Court of Criminal Appeals with instructions that they make a finding on the question of sufficiency of the evidence.

CONCLUSION

For the reasons stated in Petitioner's Brief in Support of Petition for Writ of Certiorari, Petitioner respectfully requests that this Honorable Court grant the Writ and relief prayed for.

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties in the foregoing matter with a copy of this pleading by depositing the same in the United States Mail with adequate postage prepaid thereon and properly addressed to them or by personal delivery to them.

This the 8th day of November, 1988.

s/Robert F. Prince
Robert F. Prince